

OPEN RECORDS AND MEETINGS OPINION
2004-O-24

DATE ISSUED: November 4, 2004

ISSUED TO: Southwest Multi-County Correction Center

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Curt Woodward asking whether the Southwest Multi-County Correction Center (SWMCCC) Board of Directors violated N.D.C.C. § 44-04-19 by holding executive sessions to discuss negotiating strategy regarding an early retirement package and to receive general legal advice from its attorney regarding reasonably predictable litigation.

FACTS PRESENTED

On July 8, 2004, the SWMCCC Board of Directors (Board) held a special meeting. A majority of the meeting was held in executive session for "attorney consultation regarding settlement strategies regarding Norbert Sicklers [sic] [Sickler] threats of litigation if he is discharged." SWMCCC Minutes, July 8, 2004 (misdated June 8, 2004). According to the minutes, when the open meeting reconvened, "President Wolf and attorney Bruce Selinger were authorized by the board in lieu of litigation to pursue negotiations on Norbert Sicklers [sic] employment and hoped to reach an agreement by Mondays [sic] meeting." Id. Norbert Sickler did not attend the executive session on July 8.

The following Monday, July 12, 2004, the Board held its regular meeting. Near the end of the meeting, the Board held two executive sessions. Duane Wolf, Board president, announced that "there will be a discussion of Norbert V. Sickler, Administrator's future. There may be a threat of litigation." SWMCCC Minutes, July 12, 2004. The first executive session lasted approximately 50 minutes. The Board then recessed for approximately one hour "for the attorneys to negotiate the contract of Norbert V. Sickler and SWMCCC." Id. An hour later, the Board reconvened and passed a motion to go into a second executive session. The second executive session on July 12 lasted eleven minutes. When the open meeting reconvened, President Wolf told the public that there would be an early retirement agreement written up and Mr. Selinger and Mr. Hardy (Norbert Sickler's attorney) would work out the final details. Id. Norbert Sickler did not attend the executive sessions on July 12.

ISSUE

Whether the executive sessions the Board held on July 8, 2004, and July 12, 2004, were authorized by law and limited to the topics for which an executive session may be held.

ANALYSIS

Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public. N.D.C.C. § 44-04-19. Specific statutory exemptions allow a governing body to hold an executive session. The exemptions relevant to this opinion are commonly referred to as “attorney consultation” and “negotiation strategy.” Both exemptions have certain requirements that must be met in order to close a meeting.

To properly close a meeting for negotiation strategy, three elements must be met. N.D.C.C. § 44-04-19.1(17); N.D.A.G. 2000-O-09. First, the public entity must be discussing negotiating strategy or providing negotiating instructions to its attorney or other negotiator. Id. Second, there must be litigation, adversarial administrative proceedings, or contracts which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future. Third, a meeting may be closed under this subsection only if keeping the meeting open would have an adverse fiscal effect on the public entity’s bargaining or litigating position. Id. In other words, if allowing the other party to the negotiation to listen to the discussion would result in increased costs to the public entity, a meeting may be closed. N.D.A.G. 2002-O-09.

Although the announcements made prior to the July 8 and July 12 executive sessions made vague references to negotiation, the tape recording reveals that much of the discussion in the executive sessions centered around the Board’s efforts to negotiate a contract for early retirement with Mr. Sickler. The Board discussed its strategy for negotiating a contract with Mr. Sickler and gave negotiating instructions to its attorney, Mr. Selinger. Therefore, elements one and two were present. To prevent it from being disadvantaged in its negotiations, the Board did not want Mr. Sickler or his attorney to learn about the financial incentives the Board was willing to agree to in the negotiations. Thus, element three was present. It was proper for the Board to hold an executive session for negotiation strategy because the three elements necessary to do so were present.

Attorney consultation is defined as follows:

[A]ny discussion between a governing body and its attorney in instances in which the governing body seeks or receives the attorney’s advice regarding and in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings or concerning pending civil or

OPEN RECORDS AND MEETINGS OPINION 2004-O-24

November 4, 2004

Page 3

criminal litigation or pending adversarial administrative proceedings. Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation.

N.D.C.C. § 44-04-19.1(4).

The Board, in its announcements prior to the executive sessions, makes reference to threats of litigation by Mr. Sickler. The requestor disputes that there was any such threat. According to Mr. Selinger, who responded to this office on behalf of the Board, Mr. Sickler was an employee of the Board for 22 years. Mr. Sickler drafted an employment agreement requiring "just cause" in the case of termination. Mr. Sickler hired an attorney, Al Hardy, who indicated to the Board's attorney that if the Board terminated Mr. Sickler, he would sue. Mr. Hardy presented the Board's attorney with an offer "in lieu of litigation." Mr. Sickler himself told the Board president that litigation would be forthcoming.

This office has repeatedly said that "the possibility of litigation or a proceeding by or against the governing body must be realistic and tangible." N.D.A.G. 2001-O-15. The facts presented to this office by the Board support the conclusion that there was a realistic and tangible threat of litigation. Therefore, the Board was authorized to hold an executive session for "attorney consultation."

Having determined that the elements necessary for an executive session for negotiation strategy were present, and having determined that there was reasonably predictable litigation, the remaining question is whether the discussions that took place on July 8 and July 12 in the executive sessions were limited to advice about the reasonably predictable litigation or met the requirements for negotiation strategy.

July 8, 2004, meeting

The tape recording of the July 8 meeting reveals Mr. Sickler's attorney had presented an offer for early retirement to Mr. Selinger. The Board received advice from Mr. Selinger regarding the legalities of the terms of Mr. Sickler's settlement offer and regarding the strengths and weaknesses of the Board's position, considering Mr. Sickler's employment contract. The Board discussed a counteroffer and provided instructions to the chosen negotiators, Mr. Selinger and President Wolf. The Board's discussion stayed within the parameters of attorney consultation and negotiation strategy. Therefore, the discussion did not violate the open meetings law.

The tape recording also revealed, however, that the Board took final action on two motions during the meeting. Final action on a topic discussed during an executive session must occur during the open portion of the meeting, unless final action is

OPEN RECORDS AND MEETINGS OPINION 2004-O-24

November 4, 2004

Page 4

otherwise required by law to be taken during the executive session.¹ N.D.C.C. § 44-04-19.2(2)(e); N.D.A.G. 2000-O-04. “[F]inal action means a collective decision or a collective commitment or promise to make a decision on any matter, including formation of a position or policy, but does not include guidance given by members of the governing body to legal counsel or other negotiator in a closed attorney consultation or negotiation preparation session authorized in section 44-04-19.1.” N.D.C.C. § 44-04-19.2(2)(e).

In this case, neither motion revealed the guidance given by the Board to its negotiators. The motions should have been made and the roll call votes should have been taken when the meeting reconvened in open session. It is my opinion that the Board violated N.D.C.C. § 44-04-19.2(2)(e) when it failed to make the motions and take the roll call votes in the open session.

July 12, 2004, meetings

As with the July 8 executive session, the Board’s discussion in the first executive session on July 12, 2004, was limited to discussing negotiating strategy and instructions and receiving advice from Mr. Selinger about the legal consequences of the strategy on any future litigation. The topics discussed were properly limited to negotiating strategy and attorney consultation.

As stated in the facts, the Board then recessed so that Mr. Selinger could present the Board’s latest proposal to Mr. Sickler’s attorney. After Mr. Selinger met with Mr. Sickler’s attorney, the meeting reconvened and the Board immediately went back into executive session. The tape reveals that Mr. Sickler had accepted the Board’s offer. That being the case, negotiations were complete and there was no longer any reason to hold an executive session based on negotiation strategy. Mr. Selinger was the primary speaker during this last executive session. However, he was no longer giving advice to the Board about anticipated litigation. Rather, the Board discussed five general topics: clarification of the agreement reached, the agreement’s effective date, how to deal with the press, Mr. Sickler’s replacement, and scheduling the next meeting. These conversations were inappropriately held in executive session.

¹ This office has explained in the past that the requirement that final action be taken in an open session does not relieve the governing body of its obligation to refrain from disclosing confidential information to the public. N.D.A.G. 2001-F-10. If there is confidential information in a motion, a member of a governing body may make a detailed motion in the executive session and then, in open session, the presiding officer may summarize the motion without disclosing the confidential information and call for a vote. Id.

For the reasons discussed above, it is my opinion that the first executive session held on July 12 was proper but the second executive session held after the recess violated the open meetings law.

CONCLUSION

The executive session held by the SWMCCC Board of Directors held on July 8 was authorized by law and limited to the topics for which an executive session may be held. The Board did, however, take roll call votes during the closed meeting that should have been taken in an open meeting. Therefore the Board violated N.D.C.C. § 44-04-19.2(2)(e).

The first executive session held during the July 12 meeting was authorized by law and limited to the topics for which an executive session may be held. The second executive session held July 12 violated N.D.C.C. § 44-04-19 and should have been open to the public.

STEPS NEEDED TO REMEDY VIOLATIONS

The Board must supplement the minutes of the July 8 meeting with the two motions made during the executive session and must include the results of the roll call votes. The minutes must be provided to the requester and to anyone who asks, free of charge.

The Board must provide to the requester, at no cost, a copy of the tape recording of the part of the executive session held after the recess on July 12. Minutes must be created from that portion of the executive session and added to the minutes of the July 12 meeting.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. § 44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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OPEN RECORDS AND MEETINGS OPINION 2004-O-24
November 4, 2004
Page 6

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